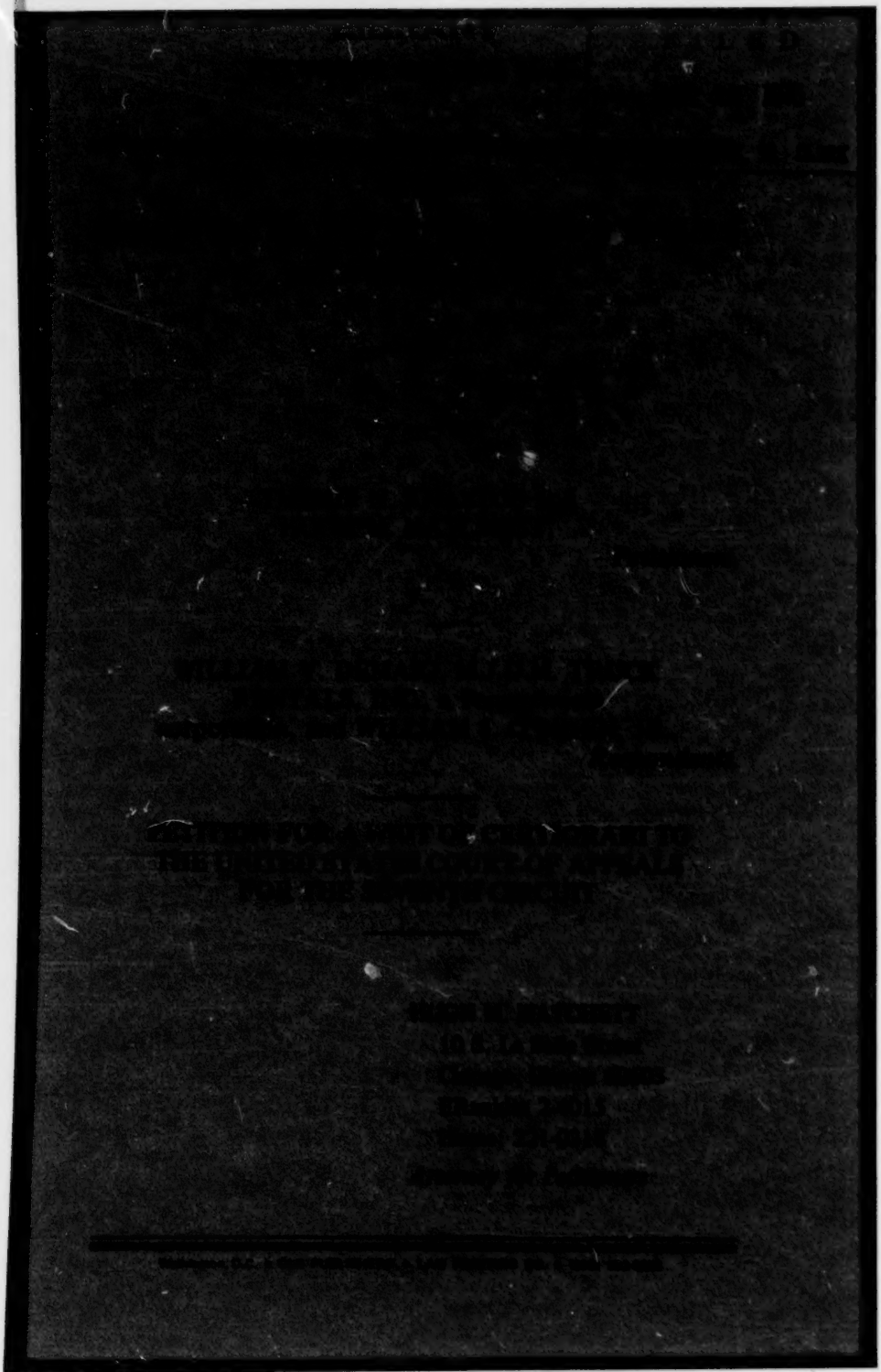

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1975

No.

THEMIS N. ANASTOS and
HUGH M. MATCHETT,

Petitioners,

v.

WILLIAM V. DEMAIO, M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and WILLIAM J. O'BRIEN, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Themis N. Anastos and Hugh M. Matchett, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit reversing a judgment in favor of two respondent clients against a respondent attorney for $47,093.31 for damages for malpractice on the ground he was not guilty of malpractice, on which

judgment petitioners had an attorney's statutory charging lien and equitable lien under Illinois law, and under a prior judgment of a State circuit court against the respondent clients for $33,429.70 for damages for their said attorney's malpractice, in litigation between the same parties, for satisfaction of their own judgment, until it was satisfied in full.

The attention of the Court is called to the fact that M.J.D.M. Truck Rentals, Inc., and William V. Demaio, two of the respondents, have themselves filed a petition for a writ of certiorari for review of the judgment of August 26th, 1975, reversing their judgment of February 28th, 1974, against the respondent William J. O'Brien.

We concur in their petition, and, as far as it goes adopt it as part of this petition as though herein fully set out, but we have several additional reasons for granting a writ of certiorari than those submitted by their petition and must present our own petition.

JURISDICTION

The date of the judgment sought to be reviewed is August 26th, 1975, and the time of its entry is August 26th, 1975.

The date of the order denying timely petitions for rehearing is September 23rd, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The writ of certiorari intended to bring the August 26th, 1975, judgment of the United States Court of Appeals for the Seventh Circuit before this Court was

applied for on December 22nd, 1975, within ninety days after the entry of the order denying rehearing as prescribed by law.

QUESTIONS PRESENTED FOR REVIEW

I.

Federal Question

Whether a summary judgment of August 8th, 1975, in a state circuit court, in an action to which petitioners and respondents were all parties, in favor of petitioners against the respondent clients in the sum of $33,429.70, with a declaratory judgment against all the respondents that petitioners have an attorney's statutory charging lien and equitable lien on the respondent clients' judgment of February 28th, 1974, against the respondent attorney for $47,093.31, in the district court, reversed by the judgment of the court of appeals of August 26th, 1975, sought to be reviewed, is res judicata that a judgment of the district court of June 3rd, 1964, was a collectible judgment when entered, and would have given rise to a judgment lien under Illinois law had it been recorded, and that the respondent attorney and his respondent clients were negligent in failing to record the judgment during the period June 3rd, 1964, and August 9th, 1964, to the damage of the petitioners in the sum of $33,429.70, and to the damage of the respondent clients in the minimum sum of $33,429.70, precluding reversal of the judgment of February 28th, 1974, and reduction of that judgment to any lesser amount.

II.

State Question

Whether under Illinois law the judgment of the district court of June 3rd, 1964, was a final judgment for a definite sum when entered, which would have given rise to a judgment lien on real estate had it been recorded, and, if so, whether its finality would have been nullified by entry of a stay of execution or the filing of a post trial motion, and, if so, whether that change in the nature of the judgment would have destroyed the judgment lien on real estate created by the recording of the judgment.

III.

Federal Question

Whether the action of the district court, and the action of the court of appeals, especially after petitioners obtained their judgments of May 8th, 1975, and July 1st, 1975, and August 8th, 1975, in failing to grant petitioners leave to intervene, violated petitioners' federal rights under Rule 24(a) of the Federal Rules of Civil Procedure, in violation of their federal rights to due process of law and the protection and equal protection of the laws under the Fifth Amendment to the Constitution of the United States.

IV.

Whether the respondent attorney abandoned his appeal from the judgment of the district court of February 28th, 1974, for $47,093.31, by successfully pleading it as a bar to a third party action against him in the state court for the amount of any judgment that petitioners might recover against him for fees either as damages or under his indemnity agreement in his employment contract to hold them harmless against attorney's fees petitioners might be entitled to receive where those issues had not been passed on by the district court because it had refused to consider them in that action at the insistence of said respondent attorney, precluding reversal of the judgment of February 28th, 1974, or reduction of that judgment to less than $33,429.70.

RULES AND STATUTES WHICH THE CASE INVOLVES

Federal Rules of Civil Procedure:

Rule 58 **Entry of Judgment**

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth

on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

Rule 79 **Books and Records Kept by the Clerk and Entries Therein**

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approvel of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

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United States Code, Title 28:

Section 1291. **Final decisions of district courts**

The courts of appeals shall have jurisdiction of appeal from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655 § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(c), 72 Stat. 348.

Section 1962. **Lien**

Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State. June 25, 1948, c. 646, 62 Stat. 958.

Section 2107. **Time for appeal to court of appeals**

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after

the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104.

Illinois Revised Statutes, Chapter 77:

Section 69. **Judgments, etc., of U.S.—May be registered, etc.**

Judgments and decrees of courts of the United States held, within this state, and all writs, returns, certificates of the levy or a writ, and records of said courts may be registered, recorded, docketed, indexed or otherwise dealt with in, the public offices of this state, so as to make them conform to the rules and requirements relating to judgments and decrees of courts of this state. 1889, April 29, Laws 1889, p. 197, sec. 1.

Section 69a. **Lien of Federal Judgments**

Upon filing in the office of the recorder of deeds in any county of this state of a transcript, certified copy or memorandum of a judgment or decree rendered or made in this state by a court of the United States, such judgment or decree shall be a lien upon the real estate of the person against whom the same is rendered or made, in the county where filed, in like manner as judgments and decrees of courts of this state. The term "memorandum" as used herein shall mean a memorandum or copy of the judgment signed by a judge of the court rendering or making

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it and showing the court in which rendered or made, date, amount, case number of the case in which rendered or made, name of the party in whose favor, and name of the party against whom rendered or made. However, no such judgment or decree shall be a lien on any real estate, registered under the provisions of "An Act concerning land titles", approved May 1, 1897, as amended,[1] until the provisions of Section 85 of said Act[2] have been complied with. 1889, April 29, Laws 1889, p. 197, sec. 2, added 1929, June 10, Laws 1929, p. 537. Sec. 1, as amended 1963, Aug. 9, Laws 1963, p. 2677, sec. 1.

Section 1. **Lien of Judgment**

With respect to the creation of liens on real estate by judgments, all real estate in the State of Illinois is divided into 2 classes.

• • •

As to real estate included within class two, a judgment shall be a lien on the real estate of the person against whom it is rendered or made in any county in this State, including the county in which it is rendered or made, only from the time a transcript, certified copy or memorandum of the judgment is filed in the office of the recorder of deeds in the county in which the real estate is located.

A judgment shall not be a lien on real estate for longer than 7 years from the time it is rendered or revived.

• • •

Section 2. **Time of restraint deducted**

When the party in whose favor a judgment is rendered is restrained, by injunction, or by appeal, or by the order of a judge or court, or is delayed, on

[1] Chapter 30, § 149 et. seq.
[2] Chapter 30, § 122.

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account of the death of the defendant, either from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time mentioned in Sections 1 or 6 of this Act. Amended by P.A. 77-970, § 1, eff. Aug. 17, 1971.

Section 6. **Limitation on execution**

No execution shall issue upon any judgment after the expiration of 7 years from the time the same is rendered, except upon the revival of the same by scire facias or by other proceeding provided by law; but real estate, levied upon within said 7 years, may be sold under the writ of execution at any time within one year after the expiration of said 7 years. 1872. March 22, Laws 1971 72, p. 505, § 6; 1963, Aug. 9, Laws 1963, p. 2678, § 1.

STATEMENT OF THE CASE

This suit was filed on June 19th, 1969. It was orginally entitled: "M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and WILLIAM V. DEMAIO Plaintiffs, vs THEMIS ANASTOS, HUGH MATCHETT, TOM YATES and WILLIAM J. O'BRIEN, Defendants." (II, 3.)

On July 9th, 1969, ANASTOS and MATCHETT filed a motion to dismiss on the ground that another action was pending between them and DEMAIO and MJDM and O'BRIEN for the same cause as is involved in this case in the Circuit Court of Cook County, Illinois, entitled: "THEMIS N. ANASTOS and HUGH M. MATCHETT, Plaintiffs, vs WILLIAM V. DEMAIO, M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and WILLIAM J. O'BRIEN, JR., De-

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fendants," filed September 10th, 1968, as Case No. 68L 13088, and the present action being in effect a counterclaim to said suit as far as DEMAIO and MJDM are concerned (I, 1).

On November 10th, 1969, DEMAIO's and MJDM's motion for a non-suit as to ANASTOS and MATCHETT was allowed.

On November 10th, 1969, the case was dismissed on YATE's motion, with prejudice.

On March 16th, 1973, ANASTOS and MATCHETT served notice of attorney's liens by registered mail on MJDM, DEMAIO, and ALBERT BEAVER, their attorney, and on O'BRIEN, and ISHAM, LINCOLN & BEALE, his attorneys, and on NATHAN YORKE, Trustee in Bankruptcy In The Matter of Hamilton Steel Products, Inc., an Illinois corporation, and NACHMAN, MUNITZ & SWEIG, his attorneys, and a notice that on that date he would file a copy of the notice of attorney's liens dated March 16th, 1973, in each case named and numbered in the title (60C 1089, 64B 10712, 68L 13088, and 69C 1304), in the office of the clerk of the court to which it belonged, as part of the record in the cause, as notice of their attorney's liens. One copy of the notice, and one copy of the notice of attorney's liens, stamped filed May 16th, 1973, appears in the record as Item 26 in Volume I, and the original of the notice, stamped filed September 19th, 1973, appears as Item 38, in the same Volume, and the original of the notice of attorney's liens, stamped filed September 19th, 1973, appears as Item 39, in the same volume. All page references are to the documents.

The notice of attorney's liens notified them of the history of the litigation. It notified them that:

Notice Of Attorney's Liens Dated And Served March 16th, 1973

The notice of attorney's liens, corrected to provide proper dates where error has been committed, advised the parties to this litigation and their attorneys that:

On or about March 1st, 1960, WILLIAM V. DEMAIO, individually, and as President of MJDM and MJDM placed in the hands of ANASTOS for suit or collection a claim, demand or cause of action of MJDM against HAMILTON STEEL PRODUCTS, INC., an Illinois corporation, for breach of contract, and agreed to pay him as a fee for legal services $2,500.00 plus one-third of whatever amount might be recovered by suit, settlement or otherwise, and subsequently HUGH M. MATCHETT was retained as co-counsel, under a novation of the employment contract by which he was to be paid one-third of THEMIS N. ANASTOS' contingent fee.

On July 8th, 1960, THEMIS N. ANASTOS and HUGH M. MATCHETT, pursuant to their employment contract, filed suit in the United States District Court for the Northern District of Illinois, Eastern Division, entitled: "M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, Plaintiff, vs HAMILTON STEEL PRODUCTS, INC., an Illinois corporation, Defendant": Case No. 60 C 1089, for $2,372,557.00.

On or about February 17th, 1962, THEMIS N. ANASTOS served a notice of attorney's lien on HAMILTON STEEL PRODUCTS, INC., an Illinois corporation, by registered mail in compliance with Chapter 13, Section 14. Illinois Revised Statutes 1961. (now Chapter 13, Section 14, Illinois Statutes 1971).

On or about April 6th, THEMIS N. ANASTOS and HUGH M. MATCHETT, were discharged by WILLIAM V. DEMAIO and M.J.D.M. TRUCK RENTALS, INC., without cause.

On June 3rd, 1964, a jury verdict was rendered in favor of M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, against HAMILTON STEEL PRODUCTS, INC., an Illinois corporation, for $107,587.00, and judgment entered on the verdict.

On June 23rd, 1964, HAMILTON STEEL PRODUCTS, INC., filed a motion for a stay of execution, a motion for judgment notwithstanding the verdict, and a motion for a new trial; and on that date, the District Court denied its motion for judgment notwithstanding the verdict and took under advisement the motion for a new trial; and at the same time, the District Court ordered "execution of judgment stayed until 10 days after ruling on the motion for a new trial".

On December 9th, 1964, alleging insolvency, HAMILTON STEEL PRODUCTS, INC., filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (11 USC §701 et seq.).

On January 22nd, 1965, HAMILTON STEEL PRODUCTS, INC.'s motion for a new trial was denied upon M.J.D.M. TRUCK RENTALS, INC.'s, filing a remittitur reducing its judgment to $60,261.00.

On February 19th, 1965, HAMILTON STEEL PRODUCTS, INC., withdrew its arrangement petition and consented to be adjudged a bankrupt under the Bankruptcy Act (USC §1 et seq.); that on the same date, NATHAN YORKE was appointed trustee in bankruptcy; that on February 26th, 1965, the bankruptcy trustee was authorized to offer HAMILTON STEEL PRODUCTS, INC.'s, real estate for sale on

March 15th, 1965; that in the order authorizing the sale, the referee directed all persons asserting liens against the real estate to show cause why it should not be sold free of any encumbrances; that M.J.D.M. TRUCK RENTALS, INC., was given notice of the order of February 26th, 1965, but did not appear at the 12th, 1965, hearing on the rule to show cause; that on that date, however, without notice to the bankruptcy trustee, M.J.D.M. TRUCK RENTALS, INC., filed with the Recorder of Deeds of Cook County, Illinois, a copy of the reduced judgment, and the judgment was duly recorded; that HAMILTON STEEL PRODUCTS, INC.'s, real estate was sold on March 16th, 1965, in open court for the sum of $327,000.00 free of all encumbrances.

On April 14th, 1965, the trustee in bankruptcy filed a motion for summary judgment, asking the referee for an order declaring that MJDM's purported lien for $60,261.00 was null and void; that title and possession of HAMILTON STEEL PRODUCTS, INC.'s, were transferred to the purchaser on May 3rd, 1965; that on December 3rd, 1965, the trustee's motion for summary judgment was sustained by the referee and M.J.D.M. TRUCK RENTALS, INC.'s purported judgment lien was declared null and void; that the bankruptcy court affirmed the referee's order.

MJDM appealed to the United States Court of Appeals for the Seventh Circuit; that on April 10th, 1967, it afformed the judgment, holding that:

> "T/he stay of execution did not prevent MJDM from recording, nor could MJDM have reasonably thought so. * * * T/here was no stay of execution in effect between June 13th, 1964, and June 23rd, 1964. MJDM has not explained its failure to record the judgment during that interval. * * * To

conclude, the trustee's lien was valid against Hamilton's property as of December 9, 1964, Being perfected thereafter, any lien of MJDM was null and void as against the trustee in bankruptcy. We realize that means MJDM will be an unsecured creditor. However, its remedy was to have promptly recorded its judgment lien or to have obtained security when the District Court stayed execution of judgment in the breach of contract case against Hamilton. Equitable relief may not be awarded now to afford MJDM a remedy at the expense of other Hamilton creditors." "See Restatement of the Law of Judgments § 129."

On September 10th, 1968, Petitioners filed a suit in the Circuit Court of Cook County, Illinois, against Respondents, as Case No. 68L 13088, for attorney's fees against DEMAIO and MJDM, and damages against O'BRIEN, in the sum of $20,843.61, plus One-Third of the costs, plus interest at the rate of 5% per annum since June 3rd, 1964, primarily on the ground that each of the defendants owed them the duty to record the judgment, and to request security as a condition for a stay of execution, and had failed in that duty, to their damage in that amount. On June 4th, 1969, the Circuit Court granted a motion to dismiss with prejudice as far as O'BRIEN, is concerned, on the ground that he owed Petitioners no duty and they were not third party beneficaries of his employment contract and are not entitled to recover for its breach. On July 3rd, 1969, Petitioners appealed the judgment, and on January 25th, 1972, the judgment was affirmed by the Illinois Appellate Court, First District, and on March 14th, 1942, a petition for rehearing was denied. The Appellate Court held that in every respect the trial judge's rulings were correct but against DEMAIO and MJDM, they could recover from them, on proper proof,

either the full amount of the contingent fee agreement or on the basis of the quantum meruit, a reasonable fee for the services they had rendered.

DEMAIO and MJDM filed Case No. 69C 1304, against THEMIS /N./ ANASTOS, HUGH /M./ MATCHETT, THOMAS sic TOM /L./ YATES, and WILLIAM J. O'BRIEN, /JR./ on June 19th, 1969, for damages in the sum of $60,261.77, plus interest from June 23rd, 1964, to March 16th, 1965, and court costs, on the ground that each of them had undertaken to prosecute Case No. 60C 1089, aforesaid, "in a proper, skillful and diligent manner as attorneys for the plaintiffs, herein", and had failed to do so by failing "to cause a transcript, certified copy or memorandum of the aforesaid judgment to be recorded until March 13, 1965", to DEMAIO's and MJDM's, damage in the sum designated, conveniently failing to state that THEMIS N. ANASTOS and HUGH M. MATCHETT had been discharged without cause on May 4th, 1964. On November 12th, 1969, the motion of DEMAIO and MJDM, for non-suit as to Petitioners, was granted, and a motion by YATES to dismiss the suit as to him was allowed.

On September 19th, 1973, and September 26th, 1973, and October 4th, 1973, and October 9th, 1973, Petitioners petitioned the district court for leave to interevene as a matter of right and as a matter of discretion, on the basis of Rule 64 and Rule 25, claiming in great detail that their rights were not being adequately protected by the respondent clients and their attorney, and insisting this deprived them of their Federal right to due process of law under the 5th Amendment. All motions were denied. The last motion was denied on February 28th, 1974.

Petitioners Themis N. Anastos and Hugh M. Matchett, in their own names, and in the names of respondents William V. Demaio and M.J.D.M. Truck Rentals, Inc., a Pennsylvania corporation, as use plaintiffs for their benefit, appealed to the United States Court of Appeals for the Seventh Circuit from the final judgment of the United States District Court of February 28th, 1975, as third persons not parties of record who have been prejudiced and aggrieved by that judgment, and from various orders of that Court during the trial of the case between Demaio and MJDM, aforesaid, as plaintiffs, and respondent WILLIAM J. O'BRIEN, as defendant, denying them leave to intervene in this case to protect their interest in this litigation, and to enforce their statutory or equitable lien, or their statutory and equitable lien, or their statutory and equitable attorney's lien, on the respondent former client plaintiffs' cause of action against said respondent defendant attorney, and the verdict on the question of liability, and the judgment appealed from or that may be entered in its place and stead, and on any money or property that may be recovered, on account of said suit, and said cause of action.

On May 8th, 1975, and again on July 1st, 1975, and finally on August 8th, 1975, the Circuit Court entered summary judgments in their favor and against the respondents Demaio and MJDM, the last judgment being in the sum of $33,429.70, with a declaratory judgment against all the respondents that they had a statutory charging lien on the judgment of June 3rd, 1964, in Case No. 60 C 1089, and an attorney's statutory charging lien and equitable lien on the cause of action and judgment of February 28th, 1975, in this case, each judgment replacing the earlier judgment.

Soon after the entry of the judgment of May 8th, 1975, petitioners filed a motion supported by a certified copy of that judgment for leave to intervene as judgment creditors to enforce their attorney's liens.

On August 26th, 1975, the court of appeals reversed the judgment, and on September 23rd, 1975, denied timely petitioners for rehearing, petitioners notifying the court of the judgments of July 1st, 1975, and August 8th, 1975, and complaining of the fact they had not been allowed to intervene. The petitions for rehearing were denied.

On September 25th, 1975, they filed their last motion for leave to intervene, set out in Appendix H, with a certified copy of each of the judgments entered by the state circuit court, the last of which judgments, that of August 8th, 1975, being set out verbatim in Appendix I. It was promptly denied.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION CONTRARY TO ESTABLISHED PRINCIPLES OF RES JUDICATA IN HOLDING THAT IT IS NOT BOUND UNDER THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION, AND THE DUE PROCESS OF LAW CLAUSE OF THE FIFTH AMENDMENT TO THAT CONSTITUTION, TO GIVE FULL FAITH AND CREDIT IN ITS JUDGMENT OF AUGUST 26th, 1975, TO THE JUDGMENT OF THE STATE CIRCUIT COURT OF AUGUST 8th, 1975.

On May 8th, 1975, and on July 1st, 1975, and for the last time on August 6th, 1975, the Circuit Court of Cook County, Illinois, in Case No. 68L 13088, involving Anastos, Matchett, Demaio, MJDM, and O'Brien, made an express finding that the judgment of June 3rd, 1964, was a collectible judgment, and an implied finding that Demaio and MJDM and O'Brien were negligent in failing to collect it, and judgments based on those findings in favor of Anastos and Matchett against Demaio and MJDM, the last findings in favor of Anastos and Matchett against Demaio and MJDM, the last Judgment of August 8th, 1975, nunc pro tunc June 3rd, 1975, being for $33,429.70, to bear interest from May 8th, 1975, with a declaratory judgment that they have an attorney's statutory charging lien on the judgment of June 3rd, 1964, and

that lien plus an equitable lien on the funds in Case No. 64B 10712, and on the cause of action or judgment or money or property recovered in this case, in the district court, for satisfaction of that judgment until satisfied in full.

Whether the decision of a lower court would ordinarily be binding on the court of appeals is beside the point. This litigation was between the same parties on the same issues as shown by the quotations from the American Law Institute Restatement, Judgments, §41, pages 161-164 under II. None of the respondents appealed from the judgment of August 8th, 1975. It is res judicata. It is entitled to full faith and credit as a matter of due process of law.

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW CONTRARY TO A DECISION OF THAT COURT AND THE STATUTES AND DECISIONS OF THAT STATE AND COMMON SENSE IN HOLDING THAT A JUDGMENT FOR A DEFINITE AMOUNT RENDERED ON THE VERDICT OF A JURY IS NOT A FINAL JUDGMENT AND DOES NOT GIVE RISE TO A JUDGMENT LIEN OR CEASES TO BE FINAL ON THE FILING OF A POST TRIAL MOTION RESULTING IN THE DESTRUCTION OF THE LIEN.

At all times during the period June 3rd, 1964, to and including August 9th, 1964, the Judgment of June 3rd, 1964, was inherently a final, enforcible judgment, and a collectable judgment, by reason of the fact it would

have been a lien on Hamilton's real estate had it been recorded, and by reason of the fact security could have been demanded as a condition of the stay of execution, and, had it not been deposited, execution would have issued as a matter of course, and Hamilton's real estate would have been levied on and sold to satisfy the judgment.

2 Bouvier's Law Dictionary, Rawle's 3rd Revision, Vernon Law Book Company and West Publishing Company 1914, pages 1718, 1722, states:

> "*Judgment. In Practice.* The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit, ... It may be on the main question, or on all of the questions, if there are several....
>
> "The decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted thereon for the redress of an injury.... It is said to be the end of the law.... It affects only parties and privies....
>
> "The language of judgments, therefore, is not 'it is decreed,' or 'resolved,' by the court; but 'it is considered' (*consideratum est per curiam*) that the plaintiff recover his debt, damages, or possession, as the case may require, or that the defendant do go without day. This implies that the judgment is not so much the decision of the court, as the sentence of the law pronounced and decreed by the court, after due deliberation and inquiry.
>
> "Litigious contests present to the courts facts to appreciate, agreements to be construed, and points of law to be resolved. The judgment is the result of the full examination of all these."
>
> "*Final judgments* are such as at once put an end to the action by determining the right and fixing the amount in dispute. Such are a judgment for

defendant at any stage of the suit, a judgment for plaintiff after verdict, a judgment for a specific amount confessed upon warrant of attorney, and a judgment signed upon the return of a writ of inquiry, or upon the assessment of damages by the master or prothonotary. Judgment for plaintiff is final also in an action brought for a specific sum, as debt for a sum certain, although entered upon a demurrer or default, because here, the *amount* being ascertained at the outset, the only question at issue in that respecting the right, and when that is determined nothing remains to be done. The question what is a final judgment becomes material in many cases where there is a right of review on error or appeal as to final, but not as to interlocutory, judgments. The term final judgment has been variously defined. A judgment which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 Bla. Com. 398. A judgment which determines a particular cause and terminates all litigation on the same right. 1 Kent 316. A judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon; *Snell v. Manufacturing Co.*, 24 Pick. (Mass.) 300; *Foster v. Neilson*, 2 Pet. (U.S.) 294, 7 L. Ed. 415; *Forgay v. Conrad*, 6 How. (U.S.) 201, 12 L. Ed. 404. A judgment is final which completely settles the rights of the parties. *Brown v. Vancleave*, 86 Ky. 381, 6 S.W. 25.

"When by any direction of a supreme court of a state, an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject to review in the Supreme Court of the United States; *Board of Com'rs of Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; but when the state court remands a cause for further

proceedings in the lower court it is not a final judgment; . . . ."

American Law Institute Restatement, Judgments, §41, pages 161-164 states:

"The rules of res judicata are not applicable where the judgment is not a final judgment.

"Comment

a. Finality of judgments. For the purposes of the rules stated in this Subject a judgment at law is not a final judgment if further judicial action by the court rendering the judgment is required to determine the matter litigated; and a decree in equity is not a final judgment if further action by the court is required beyond the supervision of the carrying out of the decree.

An order or judgment of a court is not final if an issue of law or fact essential to the disposition of the action is reserved for judicial determination. Thus, an order sustaining or overruling a demurrer is not a final judgment, although a final judgment may be entered thereafter on the order. A judgment that the plaintiff recover an amount of damages to be assessed later, by the jury or by the court, is not a final judgment.

* * *

In many States an appeal can be taken only after the rendition of a final judgment. Ordinarily the requirement of finality of judgment as a basis for appellate proceedings is the same as that of finality as is a basis for the application of the rules of res judicata."

"d. Proceedings to vacate or reverse judgment. A judgment may be final for the purposes of the rules of res judicata although the time has

not expired for the taking of proceedings, either in the trial court or in an appellate court, to set aside the judgment.

If, however, a judgment has been vacated by the trial court or reversed by an appellate court, it is no longer conclusive between the parties, either as a merger of the original cause of action or as a bar to an action upon the original cause of action; nor is it conclusive by way of collateral estoppel in a subsequent action on a different cause of action involving issues litigated in the original action.

If a different judgment is entered, this judgment is conclusive between the parties. If the original judgment has been set aside or reversed and further proceedings are directed, such as a new trial, the rules of res judicata are not applicable until a new judgment is rendered.

The mere fact that a party has made a motion in the trial court to vacate the judgment and to grant a new trial or to modify the judgment or to enter a different judgment does not deprive the judgment of its conclusive effect in another action between the parties. * * *

* * *"

In 3 Bouvier's Law Dictionary, Rawle's Third Revision, 1914, page 3259, the author states:

"*Term.* * * *

"*In Practice.* The space of time during which a court holds a session. Sometimes the term is a monthly, at others it is a quarterly period, according to the constitution of the court.

"The whole term is considered as but one day: so that the judges may at any time during the term revise their judgments. In the computation of

the term, all adjournments are to be included: Leib v. Com., 9 Watts (Pa.) 200. Courts are presumed to know judicially when their terms are required to be held by public law; Foster v. Frost, 15 N.C. 427. A term of the court may extend from the beginning of one term to the opening of the succeeding statutory term, and the beginning of another term in another district of the same circuit does not necessarily end the term of the first court; East Tennessee I. & C. Co. v. Wiggin, 68 Fed. 446, 15 C. C. A. 510, 37 U.S. App. 129.

"In England Hilary term is from January 12 to April 8; Easter, from June 9 to July 31; and Micaelmas, from Oct. 12 to Dec. 21. For the law terms before 1875, see 1 Reeves, H. E.L. 232; 3 Holdsw. H. E. L. 510."

In *Jones v. Guthrie*, 1860, 23 Ill 421, 425, by Mr. Justice Breese, the Court said:

"We do not deem it necessary now to consider more than one point in this case, and that is, was the judgment in the U.S. Circuit Court for this district, a lien upon the premises in controversy.? There is no statute of the United States making judgments rendered in their Circuit or District Courts liens upon real estate.

"By the law of this State, judgments become liens on land from the last day of the term at which the judgment was rendered, and for a period of seven years. (Scates' Comp. 603.) There being no law of the United States making judgments a lien, Congress has recognized the existence of liens under the local law, and has regulated their continuance and termination at the periods fixed by the local law. 5 U.S. Statutes at Large 238, §10; also at pages 393 and 518.

"The existence of the lien, the time at which it takes effect, and expires, must depend, therefore,

upon the local law of the State in which the judgment is rendered.

"It follows, therefore, the plaintiff should have proved when the Circuit Court adjourned, in order to show the time at which the judgment became a lien. He could not show when the lien attached, except by showing the precise day when the Court adjourned. This he did not do. The judgment is affirmed."

In *Smith v. Lind*, 1862, 29 Ill 24, 24-25, the plaintiff successfully claimed the entire proceeds of the real estate levied upon and sold by the execution issued upon the judgment recovered in that case, by reason of his superior diligence in making the levy and sale. We are not concerned with the merits of that point. We are concerned with the fact that the plaintiff argued:

" 'Judgment liens did not exist at common law, nor until the statute of Westminster 2, 13 Edward I, which gave the elegit, and subjected real estate to the payment of debts; and as judgments were entered generally of the term, and as the term was considered in law as one day, and by intendment judgments related to the commencement of the term, the lien which the courts deduced from the statutes giving the elegit, necessarily attached on the first day of the term.' Holt, C.J., Salkeld, 212.

"So the law continued, till the statute of 29th Charles II directed a date to be given to the judgment when signed, and the lien was shifted and fixed to that date. 4 Kent Com. 490, note a."

In his opinion in *Smith v. Lind*, 1862, 29 Ill 24, 29, Mr. Justice Breese said:

"Section seven, of the statute regulating the practice in the Circuit and Common Pleas Courts of Cook County, is as follows: 'All judgments

rendered in either of said courts shall become liens from the time such judgment shall be entered on the judgment docket of such court: Provided, that as between judgment creditors and other parties claiming under the lien of such judgment rendered at the same term of court, or on the same day in vacation, there shall be no preference or priority of the lien of one judgment over that of another' (Seates' Comp. 271.)

"Previous to this statute, all judgments in either of those courts, were liens only from the last day of the term of the court, at which they were rendered, and were equal liens upon the lands of the judgment debtor from that day. The act cited, does not affect this equality in any way, or alter the law as to that. The only difference between this act and the general law is, that in Cook County, judgments, as liens upon land, instead of attaching on the last day of the term, attach at the time of the recovery of the judgment, should that be the first, or any other day of the term.

"The first clause of section seven, created liens from the time the judgments were entered on the docket. This would give a priority of lien over another judgment obtained in the same term. To obviat this, the provisio was adopted, placing all judgments rendered the same day on an equality as lien.* * *"

We have established that a judgment may be final for purposes of res judicata although the time has not expired for the taking of proceedings, either in the trial court or in an appellate court, to set aside the judgment, and that the mere fact that a party has made a motion in the trial court to vacate the judgment and to grant a new trial or to modify the judgment or to enter a different judgment does not deprive the

judgment of its conclusive effect; that a term is considered as but one day, so that the judges may at any time during the term revise their judgments; and that judgment liens may run from the first day of a term, or the day the judgment is rendered, or the last day of the term, or, inferentually, thirty days after the judgment is rendered (pp 9-11). (They can even run from the day the suit is filed. *Day v. Worland*, 1883, 92 Ind. 75.) *The important thing is that a judgment lien runs during the time the statute provides it shall run, regardless of the fact that during part of that time the judgment is still subject to revision by the court, and regardless of this fact a post trial motion has been filed, refuting the position taken by the Court of Appeals that it does not because the judgment is not final, and refuting the position taken by the Court that it is not final for that purpose.*

The court of appeals decision of August 26th, 1975, and its decision of April 10th, 1967, set out in Appendix A and Appendix B are inherently in conflict, in that the decision of April 10th, 1967 held that the respondent clients would have remedied their situation by promptly recording their lien and the decision of August 26th, 1975, holds that they could not have done so. The 1967 opinion held they could have effectively recorded their lien after the stay order had gone into effect, and the 1975 opinion holds that had they done so it would not have perfected a lien. The 1967 opinion holds that had they recorded their judgment when no stay order was in effect between June 13th, 1964 and June 23rd, 1964, the subsequent stay order would not have destroyed the judgment lien, and the 1975 opinion holds that it would have destroyed it. The decisions cannot be reconciled.

There is no provision in the statutes or the rules, State or Federal, that a judgment is not final until 30 days have passed since the date of entry, or that no lien can arise once the judgment has been recorded during that period, or that upon the filing of a timely post trial motion, the judgment shall cease to be a final judgment, or that upon the filing of a timely post trial motion, a judgment lien shall cease to be a lien.

The court failed to note the distinction between a judgment inherently incapable of supporting a writ of execution, and a judgment capable of supporting a writ of execution on which execution has been stayed, and a judgment capable of supporting a writ of execution but the property is exempt from execution.

III.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION CONTRARY TO FEDERAL RULES 24(a) AND 64 IN HOLDING THAT PETITIONERS WERE NOT ENTITLED TO INTERVENE IN THIS CASE BY REASON OF THEIR ATTORNEY'S STATUTORY CHARGING LIENS AND EQUITABLE LIENS AND JUDGMENT, IN VIOLATION OF THEIR FEDERAL RIGHT TO DUE PROCESS OF LAW AND THE PROTECTION AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AMENDMENT.

Rule 24, permitting persons not named as parties to a lawsuit to intervene therein, provides a procedure by which one not made a party can protect himself from

being excluded from an action that might be detrimental to him, or from an action where he might be able inexpensively to litigate his claim.

Where an applicant has contended he may intervene as a matter of right, denial of leave to intervene is appealable, and the appellate court will consider the merits of the claim and will reverse if it determines that intervention was in fact a matter of right. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 19-67, 386 U.S. 129, 87 S.Ct. 932, 17 L. Ed.2d 814.

The rule requires the applicant to show three things for leave to intervene in a suit as a matter of right: (1) that he has an interest relating to the property or transaction involved in the action; (2) that imposition of the action may impair his ability to protect his interest "as a practical matter"; and (3) that his interest is not adequately represented by the present parties.

Even the stare decisis effect of the judgment in the existing action may create sufficient practical disadvantage to warrant intervention as of right. *Nuesse v. Camp*, C.A. 1967, 385 F.2d 694, 701-702; *Atlantis Develop. Corp. v. U.S.*, C.A. 5th, 1967, 379 F.2d 818, 828-829.

The rule allows intervention "unless the applicant's interest is adequately represented * * *." Even though the existing parties are protecting their own interest with the utmost diligence, they should not be said to provide adequate representation for an outsider whose interest is markedly different. *Nuesse v. Camp*, C.A. 1967, 385 F.2d 694, 702-704; *Atlantis Develop. Corp. v. U.S.*, C.A. 5th, 1967, 379 F.2d 818, 825. If there is any serious possibility that the applicant is not adequately represented, he should be allowed to

intervene, rather than being obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Advisory Committee Note, 39 F.R.D. 109, 110.

It is said in *Donaldson v. U.S.*, 1971, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580, that what is meant by amended Rule 24(a)(2) is "a significantly protectable interest." It is said in *Trbovich v. United Mine Workers of America*, 1972, 404 U.S. 528, 538 n. 10, 91 S.Ct. 630, 636 n. 10, 30 L.Ed. 686, that the burden of showing that representation may be inadequate "should be treated as minimal." *Peresipka v. Elgin, Joliet And Eastern Railway Company*, 1956, 231 F.2d 268, the Seventh Circuit itself held that where an attorney had an attorney's statutory under the Illinois Attorney's Lien Act, and he was discharged otherwise than for cause, he became a joint claimant and acquired an interest in the judgment ultimately rendered in the Indiana federal court, and that the court was required to protect his interest under the full faith and credit clause of the federal constitution.

In *Woodbury v. Andrew Jergens Co.*, 1934, 69 F(2nd) 49, 50, the Court said:

> "There can be no doubt that *the proceeding was strictly ancillary to the main suit*, so far as concerned the fees of Lawrence Berenson, who was an attorney of record and had a charging lien under section 475 of the Judiciary Law of New York (Control. Laws N.Y.c.30). The lien made it impossible finally to dispose of the suit without his consent; the defendant was charged with notice of it * * * and he could have forced it to pay a second time, had it disregarded his rights, * * * The suit could not itself be terminated until the validity of the lien was decided, for *the appellants*

> *were in effect parties plaintiff.* * * * The main suit had not in fact been settled when this proceeding was commenced, and ordinarily jurisdiction once attached will continue until it has been fully exercised. But we do not rely on that; it would be a matter of entire indifference to the incidental jurisdiction of the District Court if the main suit had been completely settled even before September 19, 1929, when the original rule nisi issued. The settlement did not end the suit; not even a final decree would have done so. Its purpose qua damages, was to exact payment from the defendant; only satisfaction would do that. Since, as we have already said, it was impossible to force the defendant to make any payment, until the appellants' claim, secured as it was by the cause of suit itself, was either defeated, paid or secured, *the ancillary jurisdiction* of the District Court remained as ample after the settlement as before." (Emphasis ours.)

This case is important because it establishes that attorney's lien suits are strictly ancillary to the main suit and do not divest the court of jurisdiction even though the plaintiff in the action and the dismissed attorney are citizens of the same state and the dismissed attorney is in effect a party plaintiff.

During the period March 16th, 1963, to and including the date of the filing of this petition, under the decision of the United States Court of Appeals for the Seventh Circuit in *Peresipka vs. Elgin, Joliet and Eastern Railway Company*, 1956, 231 F.2nd 268, and the Illinois Attorney's Lien Act and the decisions on which that decision is based, Anastos and Matchett have had an attorney's statutory charging lien on, and a security interest in, the cause of action and judgment in Case No. 60C 1089, and the money on deposit in Case

No. 64B 10712, and the cause of action or judgment in this case, Case No. 69C 1304, entitling them to intervene in this case as a matter of Federal right, to protect their interest, certainly after they obtained the judgment of August 8th, 1975, with the result that they have been deprived of that right without due process of law, and have been denied the protection and equal protection of the laws, in violation of their federal rights under the 5th Amendment and under Article 1, Section 2, of the Constitution of Illinois.

IV.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION CONTRARY TO THE DECISIONS OF THIS AND OTHER FEDERAL COURTS IN HOLDING THAT RESPONDENT O'BRIEN DID NOT ABANDON HIS APPEAL BY SUCCESSFULLY PLEADING THE JUDGMENT OF FEBRUARY 28TH, 1974, TO BAR A THIRD PARTY ACTION AGAINST HIM ON THE BASIS OF RES JUDICATA WHEN THE ISSUES BARRED WERE ISSUES WHICH THE DISTRICT COURT HAD EXCLUDED FROM CONSIDERATION IN THIS LITIGATION ON THE GROUND THEY SHOULD BE PASSED ON IN THE STATE LITIGATION.

On July 1st, 1974, in response to a third party complaint against him by Demaio and MJDM in Case No. 68L 13088, for damages resulting from their liability to Anastos and Matchett for their attorney's fees that they were unable to pay by reason of O'Brien's negligence, and to enforce his indemnity

agreement in his contract of employment, to hold them harmless from any attorney's fees Anastos and Matchett might be entitled to receive, O'Brien filed a motion to dismiss, partly on the ground that: "The action is barred by a prior judgment, M.J.D.M. Truck Rentals, vs. William J. O'Brien, No. 69C 1304 (N.D. Ill. March 1974), which has res judicata effect," which was granted over Demaio's and MJDM's and Petitioners protest that on February 28th, 1974.

The record shows that at the request of Demaio and MJDM and O'Brien, the District court had denied Petitioners leave to intervene, and had excluded all matters pertaining to the attorney's liens and fees in this case, either as damages sustained by Demaio and MJDM as a result of his negligence or under his indemnity agreement in his employment contract that he would hold them harmless from any fees Petitioners might be entitled to receive, on the ground those issues should be determined in that suit in the Circuit Court of Cook County, permitting O'Brien to deduct 40% of the amount of the judgment of June 3rd, 1964, as his attorney's fees, including Petitioners fees, without any set off for those fees, with the result that the judgment of February 28th, 1974, is not res judicata, with the result that O'Brien's use of the judgment of February 28th, 1974, was improper, and an acceptance of the benefit of the judgment, and a waiver of his right to appeal from it, limiting his right to defend against it to the extent Demaio and MJDM seek to have it increased.

This Argument is supported by the Transcript of Proceedings before Hon. James B. Parson, Judge, on February 28th, 1974, Volume 13.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 73-2007
THEMIS N. ANASTOS and HUGH M. MATCHETT, etc.,
Petitioners-Appellants,

v.

M.J.D.M. TRUCK RENTALS, INC., et al.,
Respondents-Appellees.

No. 74-1440
THEMIS N. ANASTOS and HUGH M. MATCHETT, etc.,
Petitioners-Appellants,

v.

WILLIAM J. O'BRIEN,
Respondent-Appellee.

No. 74-1441
M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania Corporation, and WILLIAM V. DEMAIO,
Plaintiffs-Appellants,

v.

WILLIAM J. O'BRIEN,
Defendant-Appellee,

No. 74-1442
M.J.D.M. TRUCK RENTALS, INC., et al.,
Plaintiffs-Appellees,

v.

WILLIAM J. O'BRIEN,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division—No. 69 C 1304 JAMES B. PARSONS, *Judge.*

ARGUED APRIL 9, 1975 — DECIDED AUGUST 26, 1975

Before PELL, STEVENS and TONE, *Circuit Judges.*

STEVENS, *Circuit Judge.* This is a malpractice action brought by a successful plaintiff against its former trial counsel for failing to perfect a judgment lien on the defendant's realty before the defendant commenced bankruptcy proceedings. The jury returned a verdict against the attorney. He appeals, arguing that as a matter of Illinois law the judgment in the underlying case could not have supported an effective lien because there was no time prior to the bankruptcy when the judgment was both final and subject to execution. Since we agree that recording the judgment would not have perfected a lien, the failure to do so breached no duty owed by the attorney to the plaintiff and caused the plaintiff no harm. We therefore reverse without finding it necessary to discuss the other points argued by appellant, the plaintiff's claim that the damage award should have been higher, or the contentions of the petitioners-appellants who sought leave to intervene in order to share in the recovery.

William J. O'Brien, the defendant in this malpractice action, represented the plaintiff in an action against Hamilton; that litigation is described in some detail in our opinion in *Hamilton Steel Products, Inc.* v. *Yorke,* 376 F.2d 463 (7th Cir. 1967). For present purposes we need repeat only the essential chronology.

On June 3, 1964, the district court entered a judgment of $107,587 in favor of plaintiff and against Hamilton; under Rule 62(a), Fed.R.Civ.P., all proceedings to enforce the judgment were automatically stayed for ten days. Within that ten day period, on June 12, 1964, Hamilton filed a motion for a new trial and a motion for a stay of execution.[1] On June 23, 1964 the district court took the motion

[1] In our prior opinion we incorrectly stated that the motion was filed on June 23, 1964 (see 376 F.2d at 464); the reference to an incorrect date did not affect the disposition of that appeal, but is critical on this appeal.

for a new trial under advisement and granted the stay of execution "until 10 days after ruling on motion for new trial." On January 22, 1965 plaintiff filed a remittitur reducing the judgment to $60,261, and the motion for a new trial was denied. By its terms, the stay of execution expired ten days later.

In the meantime, on December 9, 1964 Hamilton had commenced proceedings under the bankruptcy act which in due course resulted in an adjudication of bankruptcy and a sale of Hamilton's real estate. The plaintiff was thereby deprived of substantially the entire benefit of its judgment, a consequence which could have been avoided if a valid lien had been perfected prior to August 9, 1964, a date four months before Hamilton commenced bankruptcy proceedings.[2] The alleged malpractice consists of O'Brien's failure to perfect a lien on Hamilton's real estate prior to August 9, 1964.[3] His actions on behalf of the plaintiff subsequent to that time are not relevant on this appeal since we have already decided that he

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[2] *See* 11 U.S.C. § 107(a)(1).

[3] As we explained in *Hamilton Steel Products*:

> Section 1962 of the Judicial Code provides that every judgment rendered by a District Court within a State shall be a lien on the property in that State as provided by the law of the State (28 U.S.C. § 1962). The necessary reference to the governing Illinois statute provides that a judgment of a court of the United States shall become a lien upon the real estate of the person against whom the judgment is rendered upon filing a copy of the judgment in the office of the county recorder of deeds (Ill. Rev. Stats. 1965, c. 77, § 69a). Under these two provisions, it is clear that MJDM's judgment could not be perfected into a valid lien until it was filed with the Recorder of Deeds of Cook County. That was not done until March 12, 1965, long after the date of bankruptcy." 376 F.2d at 465.

did not succeed in perfecting a lien which related back to the date of the original judgment.[4]

There is no dispute about the fact that O'Brien did not record the plaintiff's judgment until after August 9, 1964. He argues, however, that an earlier recording would not have created a lien on Hamilton's real estate; therefore, he had no professional obligation to record the judgment earlier and, as a matter of law, is not guilty of malpractice.

In order to create a lien on real estate, in Illinois, a recorded judgment "must possess two qualifications: *first*, it must be final and for a definite sum; and *second*, it must be such a judgment that execution may issue thereon." *Noe* v. *Moutray*, 170 Ill. 169, 177, 48 N.E. 709, 712 (1897). See also, *City of Chicago* v. *Hall*, 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell*, 298 Ill. App. 434, 440, 19 N.E.2d 111, 114 (1939); R. Kratovil & F. Harrison, Jr., "Enforcement of Judgments Against Real Property," 1951 U. of Ill. L. Forum 1, 2; 1 Black on Judgments § 407 (1902); 2 Freeman on Judgments §§ 929, 930 (1925).

The question, then, is whether there was any time prior to August 9, 1964 when plaintiff's judgment was both final and executable.

From June 3 to June 13, execution was stayed automatically by virtue of Rule 62(a), and during the period

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[4] In our opinion in *Hamilton Steel Products, Inc.* v. *Yorke*, 376 F.2d 463, we noted that since there had been no recording of the judgment prior to December 9, 1964, there was no basis for a conclusion that a subsequent recording might effectively relate back to the date of the original judgment. It is now clear from our examination of the record and the pertinent Illinois authorities that there would have been no relation back of an effective lien even if an earlier recording had been made. In other words, our decision on the prior appeal is supportable for a reason in addition to that upon which we relied in that opinion.

after June 23, execution was stayed by the order of the district court. Plaintiff is correct in pointing out that neither of those stays of execution prevented O'Brien from recording the judgment; but if no valid purpose would have been served by recording the judgment, the failure to do so cannot constitute malpractice. Since any recording while a stay of execution was in effect would not have created a valid lien, our inquiry narrows to the interval between June 13 and June 23 when no stay of execution was in effect.

During the period after June 12, 1964, when Hamilton's motion for a new trial was filed, the judgment lacked finality,[5] it did not become final until after the remittitur was filed and the motion for new trial denied on January 22, 1965.

Thus, at no time between June 3, 1964, and February 2, 1965, was the judgment against Hamilton both executable and final. It follows that no judgment lien could have arisen at the time of recording had O'Brien recorded the judgment during that period. Nor, under Illinois law, would such a lien, which could first attach on February 2, 1965, have been related back to the date of an earlier ineffective recording. In *Lehman* v. *Cottrell, supra,* the court explained that when the deficiencies preventing attachment of a judgment lien are removed, the lien arises as of that date, and does not relate back to any earlier

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[5] As Professor Moore has explained:

"If any such motion [including a motion for a new trial under Fed.R.Civ.P. 59(b)] is timely made, the judgment ceases to be final until the motion is disposed of."

9 J. Moore, Federal Practice ¶110.08[3], at 120-121 (1973). Thus, the June 3 Judgment became interlocutory upon the filing of the new trial motion on June 12. An interlocutory order cannot give rise to a judgment lien. 1 Black on Judgments § 408; 2 Freeman on Judgments § 929.

time. 298 Ill. App. at 443.[6] *See also* 1 Black on Judgments § 408, at 644; 2 Freeman on Judgments § 929, at 1957.

It follows as a matter of law that O'Brien could not have perfected a lien on Hamilton's real estate prior to the bankruptcy and that the district court erred in failing to grant his motion for a directed verdict.

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[6] At the time of the decision in *Lehman,* Illinois law did not require that a judgment be recorded to create a lien against real property of the judgment debtor located in the county of the court rendering the judgment. The recording requirement herein involved was added by the Act of August 9, 1963, Laws 1963, p. 2678, §1. *See* S.H.A. ch. 77, §1, Historical Note (1966). Such a requirement cannot have been intended by the General Assembly to affect the other prerequisites for the creation of a valid judgment lien, however, because the recording of judgments had been required in Illinois since 1889 in order to create a lien on real estate located in counties other than that of the court that returned the judgment. *Id. Noe* and *Lehman, supra,* wherein the requirements of finality and executability are discussed, were both decided after this 1889 act. Thus, the 1963 amendment merely expanded the theretofore existing recording requirement to the county of the court rendering the judgment.

It follows that when a judgment lacking one or both of the requirements to create a lien is recorded, and the deficiencies are subsequently remedied, the lien attaches as of this latter date, at the earliest, and does not relate back to the date of recording. In other words, a recording puts third parties on notice as to the possible existence of an encumbrance, but does not create any lien prior to the time that other requirements for such a lien have been satisfied.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967

No. 15829

In THE MATTER OF HAMILTON STEEL PRODUCTS, INC., M.J.D.M. TRUCK RENTALS, INC.,

Appellant,

v.

NATHAN YORKE, Trustee in Bankruptcy of the Estate of HAMILTON STEEL PRODUCTS, INC.,

Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 10, 1967

Before KNOCH, FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Hamilton Steel Products, Inc. ("Hamilton") was an Illinois corporation organized in 1933, with its principal place of business in Chicago, Illinois. It was a manufacturer of garden equipment and children's toys.

July 8, 1960, M.J.D.M. Truck Rentals, Inc. ("MJDM"), a Pennsylvania corporation with its principal place of business in Glen Mills, Pennsylvania, filed a District Court breach of contract suit against Hamilton, seeking damages for rental of tractors and trailers by MJDM to Hamilton. On June 3, 1964, a jury verdict was rendered in favor of MJDM for $107,587, and judgment was entered on the verdict. Under Rule 62(a) of the Federal Rules of Civil Procedure, all proceedings to enforce the judgment were automatically stayed until June 13, 1964.

On June 23, 1964, Hamilton filed a motion for stay of execution, a motion for judgment notwithstanding the verdict, and a motion for a new trial. On that date, the District Court denied Hamilton's motion for judgment notwithstanding the verdict and took under advisement the motion for a new trial. At the same time, the District Court ordered "execution of judgment stayed until 10 days after ruling on motion for new trial". On January 22, 1965, Hamilton's motion for a new trial was denied upon MJDM's filing a remittitur reducing its judgment to $60,261.

On December 9, 1964, alleging insolvency, Hamilton filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (11 USC § 701 *et seq.*), but Hamilton retained possession of its assets and continued the operation of its business. The referee in bankruptcy simultaneously stayed any suits against Hamilton, after finding that Hamilton was then in default in payment of debts aggregating $1,000,000.

On February 19, 1965, Hamilton withdrew its arrangement petition and consented to be adjudged a bankrupt under the Bankruptcy Act (11 USC § 1 *et seq.*). On the same date, Nathan Yorke was appointed trustee in bankruptcy.

On February 26, 1965, the bankruptcy trustee was authorized to offer Hamilton's real estate for sale on

March 15, 1965. In the order authorizing the sale, the referee directed all persons asserting liens against the real estate to show cause why it should not be sold free of any encumbrances. MJDM was given notice of this order but did not appear at the March 12th hearing on the rule to show cause. However, without notice to the bankruptcy trustee, on that date MJDM filed with the Recorder of Deeds of Cook County, Illinois, a copy of its reduced judgment. The judgment was duly recorded.

Hamilton's real estate was sold on March 16, 1965, in open court for the sum of $327,000 free of all encumbrances. On April 14, 1965, the bankruptcy trustee filed a motion for summary judgment, asking the referee for an order declaring that MJDM's purported lien for $60,261 be declared null and void.

Title and possession of Hamilton's real estate were transferred by the bankruptcy trustee to the purchaser on May 3, 1965. On December 3, 1965, the trustee's motion for summary judgment was sustained by the referee and MJDM's purported judgment lien was declared null and void. The bankruptcy court affirmed the referee's order and this appeal followed.

The sole issue is whether MJDM's judgment became a lien on Hamilton's real estate superior to the bankruptcy trustee's. We agree with the bankruptcy court's conclusion that MJDM's purported lien was null and void.

MJDM first contends that the mortgaging of Hamilton's properties was fraudulent and deceitful. Nothing in this record shows that the mortgages were to avoid paying the judgment obtained by MJDM. The July 17, 1964, mortgage antedated the December 9, 1964, Chapter XI petition by almost five months and therefore was beyond the period prescribed by Sections 60 and 67 of the Bankruptcy Act (11 USC §§ 96 and 107). The October 15, 1964, mortgage was of course within four months preceding the Chapter XI petition and therefore may be a voidable preference (*idem.*). To avoid being surcharged, it is to be

presumed that the bankruptcy trustee, who represents all creditors, will raise any tenable objections to the mortgages in the bankruptcy court.[1] Any improprieties in the mortgages would affect all unsecured creditors equally.

Similarly, there is nothing in this record to show that the Chapter XI petition was filed in bad faith to avoid MJDM's judgment. Instead, the record shows that at the time of filing the Chapter XI petition, Hamilton's debts aggregated $1,000,000, resulting in Hamilton's insolvency.

At the time of these proceedings, Section 70c of the Bankruptcy Act provided as follows (11 USC § 110(c)):

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed, vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

This provision was enacted in 1910 to give the bankruptcy trustee "all the rights of an ideal judicial lien creditor". *Lewis* v. *Manufacturers National Bank of Detroit*, 364 U.S. 603, 605; 4 Collier on Bankruptcy (14th ed. 1964) pp. 1410-1434.

Under Section 70c, the trustee's rights as an ideal lien creditor vest "at the date of bankruptcy". That date means "the date when the petition was filed".[2] In turn, "petition" is defined as "a document filed in a court of bankruptcy * * * initiating a proceeding under this Act".[3] Another provision of the Bankruptcy Act makes

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[1] See 11 USC §§75(a)(8) and 96 (b).

[2] See Section 1(13) of the Bankruptcy Act (11 USC § 1(13).

[3] See Section 1(24) of the Bankruptcy Act (11 USC § 1(24).

it clear that where, as here, a proceeding under Chapter XI is succeeded by bankruptcy, the proceeding shall be conducted "as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter [XI] was filed".[4] By virtue of these provisions, the date of bankruptcy in this case was December 9, 1964.

Section 1962 of the Judicial Code provides that every judgment rendered by a District Court within a State shall be a lien on the property in that State as provided by the law of the State (28 USC § 1962). The necessary reference to the governing Illinois statute provides that a judgment of a court of the United States shall become a lien upon the real estate of the person against whom the judgment is rendered upon filing a copy of the judgment in the office of the county recorder of deeds (Ill. Rev. Stats. 1965, c. 77, §69a). Under these two provisions, it is clear that MJDM's judgment could not be perfected into a valid lien until it was filed with the Recorder of Deeds of Cook County. That was not done until March 12, 1965, long after the date of bankruptcy.

Under the Bankruptcy Act, the bankruptcy trustee had acquired the status of a lien creditor on December 9, 1964. Since MJDM's judgment did not become a lien until March 12, 1965, that lien is null and void as against the trustee. *United States* v. *Speers*, 382 U.S. 266, 275; *In re Goodwin*, 87 F.2d 468, 470 (7th Cir. 1937); *In re Lustron Corp.*, 184 F.2d 789, 794 (7th Cir. 1950), certiorari denied, 340 U.S. 946.

To rebut these authorities MJDM argues that the June 23, 1964, order (entered in the breach of contract action) staying execution of the June 3, 1964, judgment in MJDM's favor restrained it from recording that judgment. However, the order merely provided "execution of judgment stayed until 10 days after ruling on motion

[4] See Section 378 of the Bankruptcy Act (11 USC § 778(2)).

for new trial". The stay order did not prevent MJDM from recording its judgment. Execution of judgment would result in the transfer of property from Hamilton to MJDM to satisfy its judgment. Recording this judgment would not be execution because it does not result in any transfer of property. Recording would not affect any judgment creditor rights of MJDM against Hamilton; rather it would determine MJDM's position vis-à-vis others with claims on Hamilton's assets. Therefore, the stay of execution did not prevent MJDM from recording, nor could MJDM have reasonably thought so. In Illinois, a judgment lien and execution on a judgment are different things. *Reconstruction Finance Corporation* v. *Maley*, 125 F.2d 131, 133 (7th Cir. 1942) recognizes this difference. There the plaintiff recorded a transcript of his judgment in Knox County, Illinois, and this Court observed:

> "• • • plaintiff, by the filing of such transcript, acquired a lien upon the debtor's real estate in Knox County. No execution was issued upon such transcript • • •".[5]

In other words, the creation of a judgment lien and an execution are considered separate incidents.

In sum, nothing in the June 23, 1964, stay order prevented MJDM from recording its judgment. Moreover, there was no stay order in effect between June 13, 1964, and June 23, 1964. MJDM has not explained its failure to record its judgment during that interval.

Chapter 77 Illinois Revised Statutes (1965) Section 1 provides that "a judgment shall be a lien • • • only from the time" of recording. MJDM argues that the effect of Section 2 of this Chapter is to make the effective date of its "lien" relate back to June 23, 1964, when the stay of execution was entered by the District Court

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[5] To the same effect, see *In re Lake County Fuel & Supply Co.*, 70 F.2d 391 (7th Cir. 1934); *Holmes* v. *Fanyo*, 326 Ill.App. 624, 63 N.E.2d 249 (2d Dist. 1945).

in the breach of contract suit. Section 2 provides that "when the party in whose favor a judgment is rendered is restrained * * * from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time mentioned" in Section 1. We cannot accept MJDM's argument, for Section 2 is a provision which tolls the seven-year statute of limitations on liens and executions (Section 6 of Chapter 77) while a stay of execution is in effect. Section 2 regulates the length of time for which one is entitled to a judgment lien or execution but has nothing to do with the time at which a judgment lien is created. Because Sections 1 and 2 are separate statutory provisions governing the time and manner of creating a judgment lien (Section 1) and the duration thereof (Section 2), MJDM's relation back argument is without merit.

To conclude, the trustee's lien was valid against Hamilton's property as of December 9, 1964. Being perfected thereafter, any lien of MJDM was null and void as against the trustee in bankruptcy. We realize that this means MJDM will be an unsecured creditor. However, its remedy was to have promptly recorded its judgment lien or to have obtained security when the District Court stayed execution of judgment in the breach of contract case against Hamilton. Equitable relief may not be awarded now to afford MJDM a remedy at the expense of other Hamilton creditors.[6]

The judgment of the District Court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 23, 1975

Before

Hon. Wilbur F. Pell, Jr. *Circuit Judge*
Hon. John Paul Stevens, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*

* * (Caption—Civil No. 69 C 1304) * *

ORDER

Having considered the petition for rehearing filed on behalf of M.J.D.M. Truck Rentals, Inc., on September 9, 1975, the suggestion of party for rehearing *en banc* filed by said party on said date, and the petition for rehearing of third persons not party of record filed on September 22, 1975, and no judge in regular active service having voted in favor of rehearing *en banc*, the aforesaid petitions and suggestion are denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

September 30, 1975

Before

Hon. John Paul Stevens, *Circuit Judge*

• • (Caption—Civil No. 69 C 1304) • •

This matter comes before the Court on the "Motion For Leave To File Brief In Support Of Suggestion Of Party For Rehearing In Banc And For Reconsideration Of September 23, 1975 Order Denying Suggestion Of Party For Rehearing In Banc And Denying Petition For Rehearing" filed herein by attorney for M.J.D.M. Truck Rentals, Inc. On consideration whereof,

It Is Hereby Ordered that said motion be, and the same, is hereby Denied.

APPENDIX E

Federal Rules Of Civil Procedure Involved

Rule 64.

Seizure Of Person Or Property

"At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Rule 24.

Intervention

"(a) *Intervention of Right*. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States

confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

"(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds thereforand shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. s2403."

APPENDIX F

Illinois Statute Involved

Chapter 13, Section 14, Illinois Revised Statutes 1957 to 1973, inclusive, provides:

> "Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action. To enforce such lien, such attorneys shall serve notice in writing, which service may be made by registered or certified mail, upon the party against whom their clients may have such suits, claims or causes of action, and such lien shall attach to any verdict, judgment or decree entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than 5 days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation. As amended by act approved July 6, 1957. L. 1957, p. 1291."

Validity. *Catherwood v. Morris*, 1935, 360 Ill. 473. 196 N.E. 519.

APPENDIX G

MOTION

Now comes THEMIS N. ANASTOS and HUGH M. MATCHETT, by their attorney HUGH M. MATCHETT, and again move the Court for leave to intervene in the above entitled cause, by reason of the fact that they are and since May 8th, 1975, have been judgment creditors of WILLIAM V. DEMAIO and M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, by a series of judgments entered in their favor against them in Case No. 68L 13088, in the Circuit Court of Cook County, Illinois, entered May 8th, 1975, and July 1st, 1975, and August 8th, 1975, certified copies of which are hereto attached marked Exhibits "A" "B" and "C" respectively, the last one being in the sum of $33,429.70, nunc pro tunc June 3rd, 1975, and bearing interest at legal rate from May 8th, 1975, with a declaratory judgment in each judgment that they have an attorney's statutory charging lien on the judgment in Case No. 60C 1089, and an attorney's statutory charging lien and an equitable lien, on the money on deposit in Case No. 64B 10712, and on the cause of action or judgment or subsequent judgment in Case No. 69C 1304, with priority over WILLIAM J. O'BRIEN, JR., who was a party to that action, for payment of said judgment of August 8th, 1975, until satisfied in full, on the ground their interests have not been adequately protected by said judgment creditors in the above entitled cause, in that they did not allege as one of the grounds of complaint in this action the fact that the defendant WILLIAM J. O'BRIEN, JR., was negligent in failing to demand security as a condition of a stay of execution in Case No. 60C 1089, when he was obviously guilty of such negligence as a matter of law, which, if it

had been alleged, would require at least an affirmance of the judgment entered below, because it establishes beyond any shadow of doubt, what Judge Canel in the judgment of May 8th, 1975, and in the judgment of July 1st, 1975, and in the judgment of August 8th, 1975, found to be a fact, that the judgment of June 3rd, 1964, was a collectible judgment, ANASTOS and MATCHETT, in their pleadings, have alleged he was not only guilty of negligence in failing to record the judgment, but also guilty of negligence in failing to request security as a condition of a stay of judgment, and move the Court for leave to amend the complaint in that respect to conform to their own pleadings in 68L 13088, and to enter an order vacating your judgment of August 26th, 1975, and your order of September 23rd, 1975, and to either increase the present judgment, or affirm it, or to enter judgment in favor of THEMIS N. ANASTOS and HUGH M. MATCHETT against WILLIAM V. DEMAIO and M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and WILLIAM J. O'BRIEN, JR., for $33,429.70, on the basis of the judgment of August 8th, 1975, (which judgment has been appealed by them to the Illinois Appellate Court, First District, solely to the extent it did not give additional relief requested), execution to issue forthwith.

/s/Hugh M. Matchett
HUGH M. MATCHETT

Subscribed and sworn to before me this 25th day of September, A.D. 1975.

/s/Marilyn F. Kelly
Notary Public

APPENDIX H

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS CIRCUIT DEPARTMENT, LAW DIVISION

Themis N. Anastos, et al, Plaintiffs vs William V. Demaio, M.J.D.M. Truck Rentals, Inc., etc., and William J. O'Brien, Jr., Defendants. William V. Demaio, et al, Third Party Plaintiffs, vs William J. O'Brien, Jr., Third Party Defendant., Case No. 68 L 13088.

Judgment entered August 8th, 1975.

This matter coming on to be heard on the Complaint for Summary Judgment, as amended by the First Amendment thereto, and on the various responses to that Complaint, and on all pending motions and petitions, and the Court having examined them, and having heard the argument of counsel, and having read the briefs submitted, and being fully advised in the premises, finds that the Order of August 2nd, 1973, is in error in holding that Plaintiffs, although discharged without cause, are not entitled to recover on their contract, but can only recover on the quantum meruit; and finds that Plaintiffs, Themis N. Anastos and Hugh M. Matchett are entitled to summary judgment on their contract against the Defendants, William V. Demaio and M.J.D.M. Truck Rentals, Inc., a Pennsylvania corporation, jointly and severally, in the sum of $33,429.70, (computed as follows: $20,851.11 for the basic liability due and owing on June 3rd, 1964, on recovery of a collectible judgment in favor of said M.J. D.M. Truck Rentals, Inc., a Pennsylvania corporation,

against Hamilton Steel Products, Inc., and Illinois corporation, for $60,267.77 and costs, in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 60 C 1089, plus interest thereon at the rate of five percent per annum from June 3rd, 1964, to August 29th, 1969, a period of five years, two months and twenty-five days, amounting to $5,458.94, as provided by law during that period, and at the rate of six percent per annum from August 30th, 1969, to May 8th, 1975, a period of five years, nine months and seven days, amounting to $7,119.65, as provided by law during that period; and also finds that Plaintiffs, Themis N. Anastos and Hugh M. Matchett have an attorney's statutory charging lien on the judgment in Case No. 60 C 1089, and an attorney's statutory charging lien and an equitable lien on the funds on deposit in Case No. 64 B 10712, and on the cause of action or present judgment or any subsequent judgment that may be entered, or on any money or property which may be recovered in Case No. 69 C 1304, in the United States District Court for the Northern District of Illinois, Eaastern Division, for satisfaction of this judgment until it is satisfied in full, with absolute priority over any attorney's statutory charging lien or equitable lien of Albert H. Beaver or William J. O'Brien, Jr., in Case No. 60 C 1089 and Case No. 64 B 10712; and also finds that Albert H. Beaver has an attorney's statutory charging lien on the cause of action or present judgment or any subsequent judgment that may be entered, or on any money or property which may be recovered, in Case No. 69 C 1304; and also finds that in the absence of any inherent conflict between the attorney's statutory charging lien and equitable lien of Plaintiffs, Themis N. Anastos and

Hugh M. Matchett in Case No. 69 C 1304 and the attorney's statutory charging lien of Albert H. Beaver in Case No. 69 C 1304, which could only arise if the money or property recovered in that action was insufficient to pay their respective claim in full, it should make no determination of priority of lien, but should retain jurisdiction to make that determination if and when the need arise, without prejudice to the right of said attorneys to submit that issue to any other court of competent jurisdiction should they elect to do so. These findings specifically exclude and are without prejudice to any equitable lien rights William J. O'Brien, Jr. or Albert H. Beaver may have to recover costs and expenses of litigation incurred in the representation of M.J.D.M. Truck Rentals and William V. Demaio. Those lien rights are not adjudicated herein and may be presented to any other Court of competent jurisdiction.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED:

(a) That Plaintiffs, Themis N. Anastos and Hugh M. Matchett ought to have, are entitled to, and shall have, the order of August 2nd, 1973, vacated to the extent it holds that they cannot recover on their contract but can only recover on the quantum meruit, and it is hereby vacated to that extent; and

(b) That Plaintiffs, Themis N. Anastos and Hugh M. MAtchett ought to have, are entitled to, and shall have, and are hereby granted, summary judgment against the Defendants, William V. Demaio and M.J.D.M. Truck Rentals, Inc., a Pennsylvania corporation, in the sum of $33,429.70, execution to issue forthwith; and

(c) That Plaintiffs, Themis N. Anastos and Hugh M. Matchett ought to have, are entitled to, and shall have, and are hereby granted, a declaratory judgment that they have an attorney's statutory charging lien on the judgment in Case No. 60 C 1089, and an attorney's statutory charging lien and an equitable lien on the funds on deposit in Case No. 64 B 10712, and an attorney's statutory charging lien and an equitable lien on the cause of action or present judgment or any subsequent judgment that may be entered, and on any money or property which may be recovered, in Case No. 69 C 1304, in the United States District Court for the Northern District of Illinois, Eastern Division, for satisfaction of this judgment until it is satisfied in full, with priority over any attorney's statutory charging lien or equitable lien of Albert H. Beaver and William J. O'Brien, Jr., in Case No. 60 C 1089 and Case No. 64 B 10712; and

(d) That Albert H. Beaver ought to have, is entitled to, and shall have and is hereby granted a declaratory judgment that he has an attorney's statutory charging lien on the cause of action or present judgment or any subsequent judgment that may be entered, or on any money or property which may be recovered, in Case No. 69 C 1304; and

(e) That the Court retains jurisdiction to determine the priority of liens between Themis N. Anastos and Hugh M. Matchett on the one hand and Albert H. Beaver on the other in Case No. 69 C 1304, without prejudice to the right of said attorneys to submit that issue to any other court of competent jurisdiction should they elect to do so; and

(f) That all pending motions and petitions and prayers for relief other than the relief granted by this judgment are denied; and

(g) That the Court expressly finds that there is no just reason why this judgment should not be enforced or appealed. The Clerk is directed to use the original record, except orders, in preparing any record for appellate review of this judgment, or in preparing any record for appellate review of any judgment or order previously entered in the cause.

(h) This judgment is entered nunc pro tunc as of June 3rd, 1975 and is in lieu of all prior judgment orders and is to bear interest as provided by law from May 9th, 1975.

Judge David A. Canel
Aug 8 1975
Circuit Court

ENTER:

BY: David A. Canel
Judge David A. Canel

8/8/75

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
JAN 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-866

M.J.D.M. TRUCK RENTALS, INC., AND
WILLIAM V. DEMAIO,
Petitioners,

vs.

WILLIAM J. O'BRIEN,
Respondent.

No. 75-887

THEMIS N. ANASTOS AND
HUGH M. MATCHETT,
Petitioners,

vs.

WILLIAM V. DEMAIO AND M.J.D.M.
TRUCK RENTALS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1975.

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M.J.D.M. TRUCK RENTALS, INC., AND
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TRUCK RENTALS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioner, M.J.D.M. Truck Rentals, Inc. ("M.J.D.M."), instituted suit against Hamilton Steel Company ("Hamilton") in 1960 for unpaid truck rentals. *M.J.D.M. Truck Rentals Inc.*

v. *Hamilton Steel Products, Inc.*, No. 60 C 1089. After trial, a judgment was entered for petitioner, execution of which was automatically stayed for ten days, pursuant to F. R. C. P. 62(a). Within that ten day period, Hamilton moved for a new trial. Ten days after the expiration of the automatic ten day stay period, execution on the judgment was stayed by court order. The judgment was subsequently modified by the trial court.

Recordation of the judgment is a step in perfecting a judgment lien in Illinois. M.J.D.M.'s judgment against Hamilton was recorded when the stay order was lifted. However, Hamilton had previously filed under the bankruptcy act and the trustee sought to avoid the lien. In 1967, the Court of Appeals for the Seventh Circuit reviewed the validity of M.J.D.M.'s lien against Hamilton and concluded that it was not valid because no judgment was recorded prior to Hamilton's bankruptcy. *Hamilton Steel Products Co.* v. *Yorke*, 376 F. 2d 463 (7th Cir. 1967).

Three years after the Seventh Circuit's decision M.J.D.M. brought a malpractice action against its former attorney, W. J. O'Brien, for failure to record the judgment. After a verdict in M.J.D.M.'s favor, the Seventh Circuit reversed. Going a step beyond its analysis on the first occasion M.J.D.M. was before it, the Seventh Circuit concluded that, even if the judgment had been recorded, a valid lien under Illinois law would not have been created. The Seventh Circuit, therefore, held that the District Court should have entered a directed verdict for O'Brien in the malpractice action since M.J.D.M. suffered no harm as a result of O'Brien's action in not recording the judgment.[1]

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1. In addition to the petition filed by M.J.D.M., two of M.J.D.M.'s former council also seek review. Although the petition filed by Anastos and Matchett is virtually incomprehensible, it appears to seek review of Anastos and Matchett's right to intervene to protect claims for legal fees.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Seventh Circuit correctly decided that Illinois law requires that a judgment be (1) final and (2) executable if it is to form the basis for an enforceable judgment lien.

2. Whether the courts below correctly denied the petitions to intervene of Anastos and Matchett.

REASONS FOR DENYING THE WRIT.

1. There Is No Conflict in the Decisions of the Seventh Circuit on Any Issue Presented by This Case.

The decision appealed from involves only the narrow application of long-standing Illinois Supreme Court precedent relating to judgment liens. No amount of strained interpretation can convert this into a substantive federal question. Because this case involves only Illinois law, petitioners are obviously unable to find any conflict among the circuit court decisions. Therefore, they have been reduced to asserting the unique argument that certiorari should be granted because there is a conflict between two decisions of the Seventh Circuit relating to Illinois judgment liens. In support of this assertion they cite *Hamilton Steel Products Co.* v. *Yorke,* 376 F. 2d 463 (7th Cir. 1967) and *M.J.D.M. Truck Rentals, Inc.* v. *O'Brien,* 521 F. 2d 1301 (7th Cir. 1975). The petitioners' assertion to the contrary notwithstanding, the Seventh Circuit has indicated that there is no conflict in the holdings of these two cases. See Petition of M.J.D.M. at 4a, fn. 4.

The 1967 case dealt with whether the Federal District Court's order staying execution on the judgment in *M.J.D.M. Truck Rentals* v. *Hamilton Steel Products* had "restrained" M.J.D.M. from recording the judgment against Hamilton. M.J.D.M.

argued that it did, and that therefore the bankruptcy laws should not be applied so as to invalidate the lien of judgment against Hamilton. The court held the stay of execution did not prohibit M.J.D.M. from recording the judgment and that the bankruptcy laws prevented M.J.D.M. from perfecting a judgment lien against the property.

In addition to ruling on the issues presented, the Seventh Circuit in 1967 made several gratuitous statements which have become the underpinnings for the petitioners' argument. The petitioners make much of dicta in the last paragraph of the opinion in *Hamilton* v. *Yorke,* expressing the court's feeling that the judgment should have been recorded. It is abundantly clear from the opinion that the court was not asked to decide whether the judgment, if recorded, would have created a lien. Such an issue was not relevant to the controversy before the court and cannot be said to be any part of the holding of that case.

M.J.D.M. Truck Rentals, Inc. v. *O'Brien,* on the other hand, dealt with whether a judgment, if recorded prior to Hamiltons bankruptcy, would have created a judgment lien. The court, applying Illinois precedent, held it would not because at no time before Hamilton filed for bankruptcy did M.J.D.M.'s judgment possess the necessary requirements of *finality* and *executability.*

2. The Decision of the Seventh Circuit Is Clearly Correct.

After a searching examination of the Illinois precedent dealing with judgment liens, the Seventh Circuit found that to support a lien on real estate in Illinois a recorded judgment must be final and executable. *Noe* v. *Moutray,* 170 Ill. 169, 177, 48 N. E. 709, 712 (1897). See also, *City of Chicago* v. *Hall,* 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell,* 298 Ill. App. 434, 440, 19 N. E. 2d 111, 114 (1939); R. Kratovil & F. Harrison, Jr., "Enforcement of Judgments Against Real Property," 1951 U. Ill. L. F. 1, 2; 1 Black on Judgments, § 407 (1902); 2

Freeman on Judgments, §§ 929, 930 (1925). Petitioners are unable to cite any case which overturns these authorities.[2]

Citing 9 J. Moore, Federal Practice ¶ 110.08[3] at 120-21 (1973), the Seventh Circuit then found that while post-trial motions were pending, from June 12, onward, the judgment lacked the requisite finality. Petitioners do not challenge the accuracy of Professor Moore's conclusions. Instead, they assert the Seventh Circuit misread Professor Moore. Apparently arguing that a judgment may be "final" for some purposes and not for others, petitioners claim that the cited paragraph refers "only to the *computation of time* for the purpose of conferring jurisdiction on the appellate court . . .". (Petition for Petitioner, M.J.D.M., at 15) (emphasis in original). This simply is not what Professor Moore says.[3]

Even if the petitioners' contention that this section of Professor Moore's treatise was misused is correct, they would gain nothing. They can find no support for their primary assertion that an Illinois judgment may be final for purposes of creating a lien and interlocutory for other purposes. Illinois law requires that a judgment sufficient to give rise to a lien must be a final judgment. It does not seek to distinguish between the various factors contributing to the lack of finality. Nor does it seek to distinguish between different types of final judgments.

At the conclusion of their argument, petitioners cite *Reconstruction Finance Corp.* v. *Maley*, 125 F. 2d 131, 133 (7th Cir. 1942); *In re Lake County Fuel and Supply Co.*, 70 F. 2d 391 (7th Cir. 1934); *Holmes* v. *Fanyo*, 326 Ill. App. 624, 63 N. E. 2d 249 (2d Dist. 1945), as being in conflict with the Seventh Circuit's holding that "any recording while a stay of execution order was in effect would not have created a valid lien." The kindest thing that may be said in response to this is

2. They cite *Curtis* v. *Root*, 28 Ill. 367 (1862). To the extent that case may be relevant, it has been implicitly overruled by the cases cited above.

3. See 9 J. Moore, Federal Practice ¶ 110.08[3] at 120 fn. 2 (1973).

that these cases do not deal with any issue raised in the present case. These cases deal with the time a judgment lien will remain in effect pursuant to Illinois Revised Statutes Ch. 77 § 1 (1973).

3. Petitioners Anastos and Matchett Have No Interest in This Appeal.

Petitioners Anatos and Matchett were denied leave to intervene by the District Court and the Circuit Court of Appeals. They have filed a brief raising a number of issues relating to the merits of Judge Stevens' decision, as well as the denial of their petition to intervene. Some of the issues raised by these petitioners have already been raised by M.J.D.M. and have been discussed *supra*. However, as a matter of law, petitioners Anastos and Matchett are precluded from raising any issues except the denial of their petition to intervene. See, *United Auto Workers* v. *Scofield*, 382 U. S. 205, 209 (1965); R. Stern & E. Grossman, Supreme Court Practice, 282-83 (4th Ed. 1969) (and cases cited therein).

Petitioners assert a right to intervene to protect a claimed statutory lien on the judgment in *this case*. Petitioners are unable to state how that alleged statutory lien arose. Indeed, their assertion is totally unsupported by any authority.

For the foregoing reasons, respondent respectfully submits that the petitioners have failed to raise any important federal question appropriate for resolution by this Court. The petitions should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-866

M.J.D.M. TRUCK RENTAL, INC. & WILLIAM V. DE MAIO,
Petitioners,

v.

WILLIAM J. O'BRIEN, *Respondent.*

No. 75-887

THEMIS N. ANASTOS & HUGH M. MATCHETT,
Petitioners,

v.

WILLIAM V. DE MAIO, M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and WILLIAM J. O'BRIEN, JR., *Respondents.*

PETITION FOR A RE-HEARING OF THEIR PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes M.J.D.M. Truck Rentals, Inc. and William V. De Maio, Petitioners in Case No. 75-866 by their attorney Albert H. Beaver, and Themis N.

Anastos and Hugh M. Matchett, Petitioners in Case No. 75-887 by their attorney Hugh M. Matchett, and petition for re-hearing of their petitions for writ of certiorari to the United States Court of Appeals for the Seventh Circuit which were denied on February 23, 1976. This petition is being filed pursuant to Rule 58 (2) of the rules of this Court on substantial grounds available to petitioners although not previously presented.

This petition for re-hearing is due on or before March 12, 1976.

Hugh M. Matchett and Albert H. Beaver certify that this petition for re-hearing is presented in good faith and not for delay and is restricted to the grounds specified.

FEDERAL AND STATE QUESTIONS PRESENTED

Whether the decision of the United States Court of Appeals construing the applicable Illinois law to provide that a final judgment shall cease to be final and become interlocutory upon the filing of a post trial motion, and that a stay of execution has the effect of destroying the executability of the judgment, is a violation of petitioner's federal rights under the 5th Amendment to the Constitution of the United States because it overlooks the fact that any such provisions would be unconstitutional under the Constitution of Illinois, Article I, Section 2, and under the 14th Amendment, Section 1, to the Constitution of the United States, in the absence of the filing of a supersedeas bond, as a taking of petitioners' property without due process of law, and without just compensation, and a denial to them of the protection and equal protection of the laws by the State of Illinois.

The decision of the United States Court of Appeals construing the applicable Illinois law to provide that a final judgment shall cease to be final and become interlocutory upon the filing of a post trial motion, and that a stay of execution has the effect of destroying the executability of the judgment is a violation of petitioners' federal rights under the 5th Amendment to the Constitution of the United States because it overlooks the fact that any such provision would be unconstitutional under the Constitution of Illinois Article 1, Section 2 providing "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."; and under the 14th Amendment, Section 1 to the Constitution of the United States providing: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."; in the absence of the filing of a supersedeas bond, as a taking of petitioners' property without due process of law, and without just compensation, and a denial to them of the protection and equal protection of the laws, by the state of Illinois. This Federal and State question was not raised in or passed on by the United States Court of Appeals for the Seventh Circuit, but it is submitted that we are within well recognized exceptions to the rule that this Court will not take jurisdiction and decide Federal questions when they have not been previously raised in litigation, in that the decision of the United States Court of Appeals came as a surprise and petitioners had no real opportunity to raise the constitutional question in their petitions for re-hearing in the Court of Appeals. This case is within the rule enunciated by this Court on several occasions, that where there has been "funda-

mental error" clearly determinative of the case, this Court will consider the issue even though it was not raised below (*Terminello v. City of Chicago,* 1949, 333 U.S. 1; *Silback v. Wilson & Co.,* 1941, 312 U.S. 1; *Mahler v. Ebby,* 1924, 264 U.S. 32.)

CONCLUSION

For the reasons stated, petitioners pray that the Court will issue a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit or, in the alternative will vacate its order denying their petitions for writ of certiorari, and will issue an order referring the Federal and State Constitutional question presented to the United States Court of Appeals for the Seventh Circuit, subject to review by this Court.

Respectively submitted,

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